Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 74-1465

RICHARD F. (DICK) HAYES,

Appellant,

vs.

THE STATE OF FLORIDA, et al.,

Appellees.

On Appeal from the United States District Court for the Southern District of Florida

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JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The appellant appeals from the final judgment entered by a three-judge court of the United States District

Court for the Southern District of Florida on March 7, 1975. The final judgment of dismissal and accompanying summary judgment for the State of Florida, denied the appellant's request for injunctive relief in a suit which challenged the constitutionality of various provisions of the Florida Election Code. The appellant submits that the court below erred and that a substantial question is presented by that decision.

OPINION BELOW

The opinion below is unreported. A copy of the opinion granting summary judgment to the State of Florida, et. al. and the final judgment of dismissal are attached as an appendix to this statement.

JURISDICTION

This suit was brought under 28 U.S.C. §1343(3) to enjoin the enforcement of certain statutes of the State of Florida. A three-judge court was convened pursuant to 28 U.S.C. §2281. That court issued a summary judgment and a final judgment of dismissal on February 28, 1975 and those orders were entered by the Clerk of the United States District Court for the Southern District of Florida on March 7, 1975. A Notice of Appeal was filed in that court on March 26, 1975. The jurisdiction of this Court to review the decision by direct appeal is conferred by 28 U.S.C. §1253. The following decision sustains the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Moody v. Flowers* 387 U.S. 97, 101-102 (1967).

STATUTES INVOLVED

Florida Statutes §100.061

100.061 First primary election

A first primary election shall be held on the first Tuesday that falls on the sixth day or later in September of each year in which a general election is held for nomination of candidates of political parties. Each candidate receiving a majority of the votes cast in each contest in the first primary election shall be declared nominated for such office. . . .

Florida Statutes §101.021

101.021 Elector to receive the ballot of the political party designated in registration book

In a primary election a qualified elector is entitled to receive and vote the official primary election ballot of the political party designated in his registration and no other. . . .

Florida Statutes §101.151

101.151 Specifications for general election ballot

(5)(b) The names of unopposed candidates shall not appear on the general election ballot unless a write-in candidate has quali-

fied under §99.023. Each unopposed candidate shall be deemed to have voted for himself.

QUESTIONS PRESENTED

1. Do Florida Statutes Sections 100.061, 101.021 and 101.151(5)(b), as applied to elections in which an officeholder, not a nominee, is elected in a party primary, result in an unconstitutional disenfranchisement of persons who are prohibited from participating in that primary?
2. Do Florida Statutes Sections 100.061, 101.021 and 101.151(5)(b), as applied to elections in which an officeholder, not a nominee, is elected in a party primary, unconstitutionally infringe upon the right to associate with the political party of one's choice?

STATEMENT OF THE CASE

In Florida, only members of a political party may vote in that party's primary. Fla. Stat. §101.021. Ostensibly, the purpose of a primary is to select a party's nominee to run for a designated office in the general election. But, if no independent candidate or opposition party candidate has qualified to run in the general election, the party primary winner automatically becomes the elected officeholder. Thus the members of one political party choose not a nominee, but an officeholder, in an election in which all non-party members are excluded. This case presents the question of whether or not that disenfranchisement is consistent with the Constitution.

In this case, the appellant, Richard F. Hayes is a registered Republican voter in Dade County (Miami)

Florida. He was precluded from voting in five primary races on September 10, 1974 which elected officeholders. In those five races, the Democratic primary candidates were unopposed in the general election. Therefore the winners of the primaries were assured of their election as officeholders. Because Hayes is a Republican he had no voice in those elections. One of the offices decided in the primary was the statewide position of Florida Public Service Commissioner. Two of Hayes' five representatives in the Florida House and two of his seven representatives on the Dade County School Board were selected in the Democratic primary from which he was excluded.

On September 24, 1975, Hayes filed suit in the United States District Court for the Southern District of Florida against several state officials charged with the duty of carrying out the provisions of the Florida Election Code. He sought to declare unconstitutional and enjoin the provisions of that Code which resulted in the election of officeholders, not nominees, by members of one political party.[1] He asked the court to prevent the certification of those officeholders and requested that those five "pri-

[1]The complaint specifically disavowed any interest in voting in Democratic primaries which selected nominees. See Amended Complaint, paragraphs 12 and 15.

The action was limited to the five races from which Hayes was barred. There were similar disenfranchisements in other races. According to records compiled by the Florida Secretary of State, four United States Congressmen, one Public Service Commissioner, three State Senators, and thirty state representatives were elected to office in "primaries". Two of that number were Republicans (State House Districts 54 and 56) and thus Democrats had no voice in those elections. (See Reply to Defendants Memorandum on Summary Judgment, p. 3, n. 4). The number of local officials similarly chosen is unknown, except for the two Dade County School Board members named by Hayes.

mary" races be rerun at the time of the November general election in order that all electors could vote in those contests.

A hearing on his Motion for Preliminary Injunction requesting the aforementioned relief was continued because of the State's objection to an expedited briefing schedule. The general election date passed, and after several amendments to the original complaint, Hayes moved for summary judgment, requesting that the three-judge court declare the statutes to be unconstitutional, order new elections in the races in which Hayes was denied the right to participate and insure that no future disenfranchisement occur.[2] Agreeing that no dispute existed as to the facts, the defendants filed cross motions for summary judgment.

After argument, the Court below granted the defendants' motion for summary judgment and entered a Final Judgment dismissing Hayes' action.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The court below, in a brief, perfunctory order, dismissed the plaintiff's claim citing only *Rosario v. Rockefeller* 410 U.S. 752 (1973). That summary dismissal was a cursory treatment of a substantial question. Moreover,

[2]At the time of the final hearing (February 27, 1975) the officeholders had been officially seated for only two months. Therefore it was argued that new elections would not cause serious disruption. The appellant does not press for that relief now. However, the case is not mooted by the passage of the election, for this is a claim which is "capable of repetition, yet evading review" and thus remains a proper subject for this Court's scrutiny. See, *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498 (1911); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1972).

the improper reliance upon *Rosario v. Rockefeller* underscores the district court's misunderstanding of the issues in this case.

1. The Statutes, as Applied, Seriously Impair Fundamental Rights

Under the First and Fourteenth Amendments and the Equal Protection Clause, substantial burdens on the right to vote or to associate for political purposes are constitutionally suspect and invalid unless they serve a compelling state interest. *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Bullock v. Carter*, 405 U.S. 134 (1972); *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Williams v. Rhodes* 393 U.S. 23 (1968).

It is a state's duty to insure that citizens have access to the electoral process to choose their representatives. In *Westberry v. Sanders*, 376 U.S. 1 (1964) the Court wrote:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that necessarily abridges this right.
>
> *Id*, 376 U.S. at 17-18

The Florida Election Code, applied to a "primary" election which chooses an officeholder, totally abridges the

right of certain classes of electors, based upon their party association, to vote in those contests.[3]

A. The Infringement Upon the Right to Associate

Hayes is a Republican who was precluded from voting for five of his representatives because they assumed office by winning the Democratic primary. How could he have protected himself against that loss of voice? He cannot be expected to control his party and assure that it puts up a candidate. He could not run for all five positions himself. He could have done one thing — register as a Democrat. Then he would have been able to vote for all of the officeholders who now represent him.

Thus in order to exercise his right to vote, he would have had to forego his right to associate with the party of his choice. That right is a fundamental one protected by the First and Fourteenth amendments. *Kusper v. Pontikes*, 441 U.S. 51, 56-57 (1973). Conditioning the exercise of one constitutional right upon the relinquishment

[3]The disenfranchisement occurs only if no candidate has qualified for the opposition party primary or the general election for the specific office. The decision below, while unclear, apparently felt that this intervening fact was decisive, and that the inability to vote for an officeholder was not the State's fault, but the fault of the opposing party for not putting up a candidate. But that analysis places an intolerable burden upon an individual elector who cannot be expected to control his party or to control an independent candidate's decision to run or not to run. The appellant submits that it is the State's responsibility to protect the individual elector's franchise when it knows at the time of the first primary (Fla. Stats. §§ 99.061 and 99.152 require all but write-in candidates to qualify prior to the first primary), that the primary winner will be the officeholder. The failure to do that impairs the right to associate with the party of one's choice and the right to vote. See discussion above. (No write-ins qualified in the races at issue. The mere possibility of a write-in candidacy does not resolve the issues posed here. cf., *Lubin v. Panish*, 415 U.S. 709, 719 n. 5 (1974))

of another is too grisly a Hobson's Choice to impose upon a citizen. Florida's ability to force that choice presents a substantial question for this Court.[4]

B. The Infringement Upon the Right to Vote

The application of the statutes in "primaries" which elect officeholders creates two classes of citizens: those who are permitted to vote for an elected officeholder and those who are not. The latter group are totally disenfranchised in each of the races from which they are barred. The disenfranchisement is grosser than that struck down in the reapportionment cases. There, voters' rights were diluted. Here they are non-existent.

This case resembles the "special interest" voting cases. *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Cipriano v. Houma*, 395 U.S. 701 (1969); *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970). In each of those cases the Court rejected the argument that one group of otherwise qualified voters was more substantially affected and directly interested than another, and prohibited the limitation of the franchise to those who claimed a "special interest" in the outcome.

The decision below conflicts with those cases. Members of one political party have no "special interest" in

[4]Ironically, changing parties is no guarantee that one will vote for all of his or her representatives. Some Democrats and some Republicans might be elected to office in their respective primaries in a given voting district. In that case, members of both parties will be disenfranchised in those races. That underscores the fact that the issues in this case cut across party lines and pose the possibility of disenfranchisment for all Floridians who choose to associate with the political party of their choice. See note 1, *supra*.

electing an office holder. All voters are substantially affected by and directly interested in the decision as to who will represent them. Where a voter seeks to be heard in that decision and is foreclosed, the constitutional question is a substantial one.

2. No Legitimate State Interest is Served by The Disenfranchisement.

The only possible legitimate state interest justifying Hayes' exclusion is the right of a state to protect against primary raiding.[5] *Rosario v. Rockefeller*, 410 U.S. 752 (1973) recognizes that a state may insure the integrity of its electoral processes by adopting reasonable methods to keep members of one political party from choosing the other party's weakest candidate to run in the general election. The court below, by citing only *Rosario* in their brief order, must have believed that Florida was protecting a similar interest.

However, an understanding of Hayes' claim makes it clear that raiding is not an issue here. The races from which Hayes was precluded were not primaries as we generally know them. They did not choose nominees. They chose officeholders. No raiding could occur because there

[5]It is not inconceivable that illegitimate interests are served by a scheme such as this. In a state in which one party dominates, that party puts new voters in the position of having to join that party in order to get an effective voice in the electoral process, since most offices will be decided at the primary stage. Thus, over a period of time the second party's membership is gradually diminished.

would be no general election.[6] Therefore, not even a rational reason exists for the state to disenfranchise Hayes, and *Rosario v. Rockefeller* is not relevant to this case.

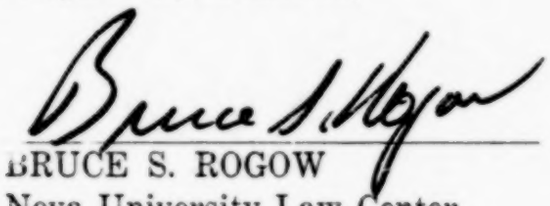
In the absence of a compelling interest, the State's preclusion of non-party members from party "primaries" which choose officeholders, not nominees, is unconstitutional.

[6]At one point in this litigation the defendants suggested that non-party members might vote for the weakest opposing party's candidates, presumably so that two or four years later they could be defeated. That assumes a perverse conspiracy to agree to suffer incompetent elected officials. We respectfully submit that that asks one to assume too much and does not justify the state's exclusion of otherwise qualified voters.

CONCLUSION

Because the questions presented are important; because they present substantial issues of law which this Court should decide; and because the decision below conflicts with this Court's long line of cases protecting the right to vote and the right to associate, the Appellant respectfully submits that probable jurisdiction should be noted.

Respectfully submitted,



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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 74-1240-Civ-JLK

RICHARD F. (DICK) HAYES,
Plaintiff,

vs.

THE STATE OF FLORIDA, et al,
Defendants.

SUMMARY JUDGMENT FOR DEFENDANTS

This is a civil rights action involving a challenge to the constitutionality of selected provisions of the Florida Election code. The action is brought under 42 U.S.C. §1983, and the jurisdiction of the court is invoked pursuant to 28 U.S.C. §1343(3). Since the plaintiff seeks to enjoin the enforcement of the laws, a three-judge court was duly convened. 28 U.S.C. §2281. The relevant facts being undisputed, the parties have filed cross motions for summary judgment.

Under Florida Law, the name of an unopposed candidate does not appear on the general election ballot unless a write-in candidate qualifies to run for office; the unopposed candidate is "deemed to have voted for himself." Fla. Stat. §§101.27(4), 101.151. Also, a member of one political party is not permitted to vote in another party's primary election. Fla. Stat. 101.021.

Because these laws, as applied, do not impose unequal and unjustifiable burdens on access to either the ballot or the ballot box, the laws pass constitutional muster. They do not become unconstitutional simply because people fail to exercise their equal rights. See Rosario v. Rockefeller, 410 U.S. 752 (1973). Therefore, it is

ORDERED and ADJUDGED that the defendants' motion for summary judgment be and the same is hereby granted; and the plaintiff's motion for summary judgment be and the same is hereby denied.

DONE and ORDERED in chambers at Miami, Florida, this 28th day of February, 1975.

/s/ David W. Dyer

DAVID W. DYER
UNITED STATES
CIRCUIT JUDGE

/s/ Peter T. Fay

PETER T. FAY
UNITED STATES
DISTRICT JUDGE

/s/ James Lawrence King

JAMES LAWRENCE KING
UNITED STATES
DISTRICT JUDGE

cc: All Counsel

[TITLE OMITTED]

FINAL JUDGMENT

The above-styled action, having come on for hearing before a three-judge court, the Honorable David W. Dyer, United States Circuit Judge, and the Honorable Peter T. Fay, and Honorable James Lawrence King, United States District Judges, presiding, and summary judgment having been granted for the defendants, it is

ORDERED and ADJUDGED that the above-styled action be and the same is hereby dismissed on the merits.

DONE and ORDERED in chambers at Miami, Florida, this 28th day of February, 1975.

/s/ David W. Dyer

DAVID W. DYER
UNITED STATES
CIRCUIT JUDGE

/s/ Peter T. Fay

PETER T. FAY
UNITED STATES
DISTRICT JUDGE

/s/ James Lawrence King

JAMES LAWRENCE KING
UNITED STATES
DISTRICT JUDGE

cc: All Counsel

[TITLE OMITTED]

NOTICE OF APPEAL

Notice is hereby given that the plaintiff, RICHARD F. (DICK) HAYES hereby appeals to the Supreme Court of the United States from the Final Judgment dismissing his action and the Summary Judgment for Defendants ordered on February 28, 1975 and entered on March 7, 1975. This appeal is taken pursuant to Title 28 U.S.C. §1253.

March 25, 1975.

/s/ Bruce S. Rogow

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Appeal was mailed, postage prepaid to Thomas A Harris, Assistant Attorney General, Department of Legal Affairs, 725 South Calhoun Street, Tallahassee, Florida 32304 and Alan J. Kan, Assistant County Attorney, Dade County Courthouse, Miami, Florida 33130, this 25th day of March, 1975.

/s/ Bruce S. Rogow

Bruce S. Rogow

[TITLE OMITTED]

CERTIFICATE

THIS IS TO CERTIFY that on March 26, 1975, Plaintiff RICHARD F. HAYES, filed a Notice of Appeal to the Supreme Court of the United States appealing from the Judgment and Summary Judgment entered in this court on March 7, 1975.

JOSEPH I. BOGART, CLERK

By: /s/ Ruth M. Wood

Deputy Clerk